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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-195

ANN WHEELER, et al., *Petitioners,*

v.

THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, INC.; THE ROMAN CATHOLIC ARCHBISHOP OF BOSTON; and THE PLANNING OFFICE FOR URBAN AFFAIRS, INC., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Did the Massachusetts Supreme Judicial Court properly affirm a lower court disposition by summary judgment of a dispute between the Catholic Archbishop of Boston and certain laity in his diocese over his decision to utilize church land for the construction of housing for lower income families?

STATEMENT OF THE CASE

Petitioners, parishioners of St. Mary of the Nativity parish in Scituate, Massachusetts, (Parishioners)[1] seek review by writ of certiorari to the Massachusetts Supreme Judicial Court with respect to its decision affirming dismissal by the State Superior Court of their request for an order voiding the transfer of a parcel of Archdiocesan land by the Roman Catholic Archbishop of Boston (Archbishop) to facilitate construction of low and moderate income cooperative housing.

This controversy is the most recent episode in a seven-year effort by the Archbishop to construct 40 units of low and moderate income housing on vacant church land owned by him. This is the second time that a petition for a writ of certiorari involving this effort has been presented to this Court. 439 US 1078 (1978) The facts underlying this sequence of administrative and judicial decisions are summarized below.

St. Mary of the Nativity parish was established in 1921 as an unincorporated subdivision of the Archdiocese of Boston by the then Ordinary[2] of the Archdiocese. The Archdiocese itself is a purely ecclesiastical entity of the Roman Catholic Church and exists to minister to the members of the Roman Catholic faith within its geographic jurisdiction, which is generally limited to the counties of Essex, Plymouth, Middlesex,

[1] The only evidence in the Record that the plaintiffs are parishioners is an unsupported allegation in the Amended Complaint. The respondents neither concede nor deny the plaintiffs' status as parishioners.

[2] In Roman Catholic terminology, the holder of an ecclesiastical office having territorial jurisdiction. The Archbishop is the Ordinary of Boston.

Suffolk, and Norfolk, in Massachusetts. All real and personal property of the Archdiocese, including all real estate within St. Mary of the Nativity parish, church, rectory, and hall, as well as other land utilized as a cemetery, and until August 4, 1977, the vacant land which is the subject of this controversy, is or was owned by the Roman Catholic Archbishop of Boston, a corporation sole. Archdiocesan land is thus held by virtue of Mass. St. 1897 c. 506, entitled "An Act to Incorporate The Roman Catholic Archbishop and His Successors a Corporation Sole, To Hold and Manage Certain Property For Religious and Charitable Purposes".

On May 24, 1939, the property was purchased from Rockland Trust Company by the Archbishop for the sum of $2,000. The deed contains no restrictions or other indications as to its proposed use. The land was vacant at that time and remains so today. It has never been established as a cemetery by the Town of Scituate. Mass. Gen Laws Ann. c. 114 s. 34 (West 1971) prescribes that cemeteries may be established only by written approval of the Board of Health after notice and hearing in the community and inclusion in the records of the Board of Health of a description of the land sufficient for its identification. Although the 1939 Scituate Town Meeting authorized the Board of Health to grant a cemetery permit, no application for such a permit was ever sought or granted.[3]

[3] On June 20, 1973, some of the plaintiffs and other citizens filed an article seeking to have the town acquire the property by eminent domain for cemetery expansion. At a public hearing, the town's Interment Committee reported the 3,022 available graves existed in Scituate and expressed opposition to the article. The eminent domain article failed of passage at a special town meeting on July 23, 1973.

In 1972, the Archbishop decided to undertake an Archdiocesan Housing Program which would consist of the construction of low and moderate income housing units on parcels of Archdiocesan land in a number of suburban communities with the provision that title to the housing would, upon occupancy, be transferred to the resident in the form of cooperative ownership.

The Archbishop directed that the Archdiocesan Housing Program be planned and executed by the Planning Office for Urban Affairs, Inc., (the Planning Office) a charitable corporation organized by the Archbishop under the provision of Mass. Gen. Laws Ann. c. 180 (West 1958), and established to undertake, *inter alia,* this type of activity. Although a separate legal entity, the Planning Office is an agency of the Archdiocese and listed as such in the Official Catholic Directory. The Archbishop is President and Treasurer and appoints all members of the corporation.

Acting upon the recommendation of professional consultants that the vacant five-acre site in Scituate was suitable for the type of housing contemplated, the Planning Office submitted a preliminary application to the Massachusetts Housing Finance Agency (the MHFA) which approved the site on September 29, 1972.

As a courtesy, the Archbishop directed the Planning Office to explain the Archdiocesan Housing Program and the Scituate proposal to St. Mary's parish council which endorsed the development of the site with housing.

On May 1, 1973, the Planning Office sought authorization from the Scituate Zoning Board of Appeals (Scituate) to develop forty townhouse type dwellings

to be made available to low and moderate income families. The application for a comprehensive permit was submitted in accordance with Mass. Gen. Laws Ann. c. 40B ss. 20-23 (West 1979) and stated that the Planning Office was an agency of the Archdiocese of Boston and was acting at the request of the Archbishop, "who will convey the property to the Applicant prior to the closing of the mortgage loan." The Planning Office had previously obtained a firm commitment from the MHFA to provide financing for the project pursuant to Mass. St. 1966, c. 708 (unofficially codified at Mass. Gen. Law Ann. c. 23A App., ss 1-1 et seq. (West 1973), which authorizes the agency to make first mortgage loans to sponsors of multi-family dwellings. After conducting an administrative hearing, Scituate denied the application on June 29, 1973.

In accordance with Mass Gen. Laws Ann. c. 40B, s. 23, the Planning Office appealed that decision to the Housing Appeals Committee (the Committee) which is authorized to hear appeals by developers when an application for a comprehensive permit is denied by a local board. The Committee concluded, after an extensive adjudicatory hearing, that Scituate's denial of the application was unreasonable and not consistent with local needs, in contravention of the standards set forth in Mass. Gen. Laws Ann. c. 40B, s. 20. Accordingly, the Committee directed Scituate to issue the comprehensive permit, as provided by Mass. Gen. Laws Ann. c. 40B, s. 23.

Scituate petitioned the Massachusetts Superior Court for review of the Committee's decision. The Superior Court entered judgment denying the petition and affirming the Committee's decision. The Massachusetts Appeals Court affirmed the judgment of the

Superior Court, and the Massachusetts Supreme Judicial Court denied Scituate's Application for Further Appellate Review. Both the Superior Court and the Appeals Court rejected Scituate's contention that the Committee's decision violated the First Amendment by excessively entangling the Commonwealth in church affairs, and that church related entities were precluded from participating in government subsidized housing programs.

Scituate submitted a petition for a writ of certiorari to this court which denied the petition on February 16, 1978, 434 US 1078, and on April 6, 1978, Scituate finally issued the comprehensive permit.

On March 21, 1978, 39 years after the property's acquisition, the Parishioners brought suit against the Archbishop (and subsequently the Planning Office), seeking, *inter alia,* an accounting by the Archbishop, a judicial determination that a resulting trust be established in their favor, and entry of a judgment ordering conveyance of the property to them.

On May 9, 1978, a Superior Court judge granted the Respondents' motion to dismiss the Parishioners' complaint on the grounds that it involved a purely religious dispute between Roman Catholic laity and their Archbishop over which civil courts lacked jurisdiction by virtue of the First Amendment to the U.S. Constitution.

While pending in the Massachusetts Appeals Court, The Supreme Judicial Court assumed jurisdiction of the appeal *sua sponte* by order on March 13, 1979. On May 10, 1979 the Supreme Court affirmed the dismissal in the court below and confirmed earlier decisions in-

dicating its view that sound policy dictated that denominations rather than civil courts should interpret their own church polity.

REASONS FOR DENYING THE WRIT

It is well settled that ecclesiastical decisions regarding church affairs are beyond the pale of the jurisdiction of civil courts.[4]

The Massachusetts Supreme Judicial Court has in the instant case found that the decision in question was (a) a matter of ecclesiastical discretion within the competence of the approved church officials and (b) beyond the jurisdiction of the Massachusetts civil courts. The decision in question was that of the Archbishop to alienate certain church properties for the benefit of individuals in need of appropriate housing.

The essence of this controversy is whether the Archbishop may utilize church land for the construction of low and moderate-income cooperative housing against the wishes of eight parishioners who oppose construc-

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[4] Watson v. Jones, 80 US 679 (1871); Gonzalez v. Roman Catholic Archbishop of Manila, 280 US 1 (1929); Kreshilk v. St. Nicholas Cathedral, 363 US 190 (1960); Presbyterian Church v. Blue Hull Memorial Presbyterian Church, 393 US 440 (1960); Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 US 696 (1976). Jones v. Wolf, —— U.S. —— (1979). Fitzerald v. Robinson, 112 Mass. 371, 379 (1873). Grosvenor v. United Society of Believers, 118 Mass. 78 (1875). Carter v. Papineau, 222 Mass. 464 (1916). Moustakis v. Hellenic Orthodox Society of Salem and Peabody, 261 Mass. 462, 466 (1928). Cohen v. Silver, 227 Mass. 230, 235 (1931). Solomon v. Congregation Tiffereth Israel of Revere, 344 Mass. 755 (1962). United Kosher Butchers Association v. Associated Synagogues of Greater Boston, Inc., 349 Mass. 596, 598 (1965). Mitchell v. Albania Orthodox Diocese in America, Inc., 355 Mass. 279, 282 (1969).

tion of such housing. According to the Petitioners the issue is simply whether the land bought by the Archbishop with the parishioners' extra contributions was impressed with an enforceable parol trust or a resulting trust in favor of the parishioners for use as a cemetery." (Petition for Writ of Certiorari 79-195, p. 13.)

Certain facts significantly support the Respondents contention that the Parishioner's motive for instituting this suit is to frustrate the Archbishop's decision to utilize church land for church purposes which they oppose. First, a legally established cemetery owned and maintained by the Archbishop is located within the parish directly across the street from the locus. (Pet. for Writ 79-195, p. 3a, App.) Secondly, for 39 years, the Parishioners demonstrated no interest in the development of the locus as an additional cemetery. Even after the Archbishop's housing plans were made known, the Parishioners demonstrated no interest in the development of the locus as an additional cemetery. Even after the Archbishop's housing plans were made known, the Parishioners remained silent for six years and brought this civil suit only when this Court ended Scituate's appeals and issuance of the comprehensive permit which would allow construction became certain.[5]

It follows therefore that the crux of this litigation is whether the highest ecclesiastical official within the ecclesiastical jurisdiction may implement his decision involving church property to which he holds fee simple title against the will of certain laity. In its most

[5] The Parishioners filed a *Lis Pendens* in the Registry of Deeds at the time of filing their complaint. The continuing litigation has prevented a loan closing.

basic terms, who makes decisions within the Roman Catholic Church?

It is submitted that the ordering of decision making and administrative duties within a hierarchial church is the essence of internal polity. This Court has repeatedly held that the identification of internal lines of authority are matters exclusively within the competence of the appropriate ecclesiastical authority. The rationale of this Court's decision in *Serbian Orthodox* v. *Milivojevich, supra,* and its predecessors is grounded in two principal considerations involving the Free Exercise Clause of the Constitution.

First, there is the understanding that a hierarchial church is a *sui generis* institution. The internal lines of authority or responsibility may take whatever shape and contour ecclesiastical authorities deem necessary for that institution to operate under its understanding of itself.

This right of churches to organize themselves as they deem proper and to establish tribunals for deciding controversies within the church which was recognized by this court in *Watson* v. *Jones* (1871). supra at 728-729:

> All who united themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Secondly, the Supreme Court has recognized in *Serbian Orthodox, supra,* that there is a cognizable and negative impact upon Free Exercise rights by the im-

position of civil liability in a manner which conflicts with the internal lines of authority of a hierarchial church. The practical result of such action is to substitute the court's judgment of how the Church should be organized for that of the appropriate ecclesiastical authority.

It is the contention of the Respondents that the interpretation of lines of authority, supervision and decision making within the Church and its internal polity are matters wholly within the authority of ecclesiastical law and that the Free Exercise Clause of the First Amendment guarantees hierarchial churches freedom from government determination of their internal structure. *Serbian Orthodox, supra.*

The Massachusetts Supreme Judicial Court correctly recognized that acceptance of jurisdiction would require it to interpret ecclesiastical law pertaining to the allocation of power, rights, and responsibilities within the Roman Catholic Church, and to investigate the theological basis of the Archbishop's decision, all areas denied to the civil courts by the First Amendment to the United States Constitution.

The Roman Catholic Church has long recognized as a legitimate activity the performance of charitable acts for the service of man. The theological dimensions of such acts are twofold. First, such acts are an expression of the fulfillment of the mandate "to love one another" which is of fundamental import to the Christian belief. Secondly, the Church's active participation in such acts operates in a didactic fashion expressing by example the teaching of the Church with respect to social justice.

> "In fact, the Church is able, indeed it is obliged, if times and circumstances require it, to initiate action for the benefit of all men, especially those in need, like works of mercy and similar undertakings.
>
> The Church, moreover, acknowledges the good to be found in the social dynamism of today, particularly progress towards unity, healthy socialization, and civil and economic cooperation. The encouragement of unity is in harmony with the deepest nature of the Church's mission."

Pastoral Constitution on the Church in the Modern World, *Gaudium Et Spes,* 7 December, 1967.

It is a special responsibility of every Ordinary to make manifest the Church's teaching. This function relates not only to matters of doctrine and morals but also with respect to social justice.

> Bishops, to whom has been committed the task of directing the Church of God, along with their priests, are to preach the message of Christ in such a way that the light of the Gospel will shine on all activities of the faithful. Let all pastors of souls be mindful to build up their daily behavior and concern an image of the Church capable of impressing men with the power and truth of the Christian message. By their words and example and in union with religious and with the faithful, let them show that the Church with all its gifts is, by its presence alone, an inexhaustible font of all those resources of which the modern world stands in such dire need.

Decree on the Pastoral Office of Bishops in the Church, Vatican II, Christus Dominus, 28 October 1965.

The action of the Archbishop to commit certain portions of the Church's patrimony to the construction of

decent housing for those in need of it is clearly an action taken in the exercise of his ecclesiastic responsibilities in charity and in his teaching function.

> The Catholic community has a responsibility to act effectively to help meet the needs of those who lack adequate housing. We must confess that we have not done all we could. It is not enough for us to point to the reality of poor housing and recommend that government and other institutions take appropriate action. We must also reflect on our own responsibilities and opportunities for action. We call on individual Catholics, dioceses and parishes, as well as other Catholic organizations, to join us in a new commitment to those who suffer from poor housing.
>
> The Church alone cannot provide a significant quantitative answer to the cries for better housing. This is not its specific role, nor does it have the financial and technical resources to build all the required homes. However, it is our responsibility to proclaim the Gospel of Jesus Christ and its implications for our society. We must analyze in a competent and critical manner the aspects of housing which pertain to social justice. We must point constantly to human rights—and human suffering—involved in this issue. We must apply Christian social teaching to the resolution of the problem. We must seek to have a qualitative impact on the problem of housing deprivation in our society by attempting to change the systems and the policies that result in housing deprivation. There seem to be five possible approaches for Church involvement in housing: awareness, advocacy, providing services, stewardship and community-building.

The Right to a Decent Home, A Pastoral Response to the Crisis in Housing, A Statement of the Catholic Bishops of the United States, November 20, 1975.

Moreover, the recent decision of *Jones* v. *Wolf, supra,* (1979) is inapplicable in this instance. The Parishioners seek a civil judicial decree ordering conveyance of the property to them claiming that the Archbishop acquired title subject to either a valid parol trust or an enforceable resulting trust in their favor for use of the locus as a cemetery (Petition, supra, p. 5).

Under Massachusetts law, cemeteries may be established by municipalities or charitable (fraternal or religious) corporations. The municipality has declined to acquire the property and establish a cemetery (see fn. 3, supra).

Since the Petitioners are acting as parishioners, they presumably would establish any cemetery as a parish cemetery. Mass.St. 1897 c. 506 provides that Catholic cemeteries may be established, owned and maintained only by the Archbishop. In addition, ecclesiastical law requires that Catholic cemeteries be consecrated land, a sacramental act which can be performed only by or with the consent of the Archbishop. For a civil court to order the Archbishop to consecrate a cemetery against his will would be a gross violation of the Free Exercise Clause of the First Amendment.

Mass. Gen. Laws Ann. c. 114, s.34, supra, provides that no cemetery, municipal or private, may be established without the written approval of the local Board of Health after notice and public hearing. There is no certainty, and in view of the report of the town's interimmit committee (see fn. 3, supra), there is little likelihood that the Board of Health would grant approval for an additional parish cemetery. Since establishment of an additional parish cemetery by the Parishioners is an impossibility under both church and civil

law, there is no way which the parishioners trust argument can be sustained.

The Massachusetts Supreme Judicial Court decision is wholly consistent with its earlier decisions and merely reaffirmed the law in Massachusetts. "It is settled by our decisions that courts will not interfere in a controversy which is exclusively or primarily of an ecclesiastical nature." *United Butchers Association* v. *Associated Synagogues of Greater Boston, Inc., and Others,* supra at 598.

The rationale behind this policy was enunciated in *Moustakis, et al* v. *Hellenic Orthodox Society,* supra, at 466.

> "Courts do not inquire into questions exclusively ecclesiastical for the reason that religious freedom is the constitutional right of all citizens under our government; and for the further reason that, if the courts should deal with litigation of that nature, the whole subject of doctrinal theology, the customs, canonical laws both written and unwritten, and the fundamental organization of the various religious denominations would need to be examined with care for the purpose of reaching authoritative conclusions. Such a course by the courts would in the end deprive the denominations themselves of interpretations of their own body of church polity, and would establish the courts as the final arbiter in every religious controversy. The evils attendant upon such a practice have been thought far to outweigh the incidental advantage that might flow from its adoption."

Thus, the Massachusetts courts have adopted the same principles which this Court has established in its cases from *Watson* to *Milivojevich* v. *Serbian Orthodox,* supra.

This Court's decision in *Jones* v. *Wolf,* —— U.S. —— (1979) also recognizes that judicial resolution of the locus of decision making in a hierarchical church is not "neutral". Churches exist in time and space. The spiritual work which they carry on, both in worship and in the works of service, takes tangible and physical manifestations in property: hospitals, orphanages and housing, as well as churches and rectories.

The consequence of considering property as distinguishable from the church is to view the church as somehow existing apart and separately from its physical, tangible elements. To suggest that this church property can be treated by "neutral principles" which have no relevance to the First Amendment is to suggest that the organic nature of the institution can be ignored,

> . . . If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal body. Jones v. Wolf, slip opin.—p.9, citing, *Serbian Orthodox Diocese,* supra at 709.

Thus, the decision of the Massachusetts Supreme Judicial Court is in complete accord with the decisions of this Court.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for certiorari or in the alternative summarily affirm the decision of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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